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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1643

GEORGE T. APPLEYARD, III.
and JAMES W. CAIN,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION,

Respondent.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

****

PETITION FOR WRIT OF CERTIORARI

****

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PETITION FOR WRIT OF CERTIORARI

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on April 3, 1975.

CITATIONS TO OPINIONS BELOW

The April 3, 1975, opinion of the United States Court of Appeals for the Fourth Circuit is not published. This action originated in the United States

District Court for the Middle District of North Carolina. The opinion of that court is not published. The court of appeals decision and the district court decision are set out in the Appendix hereto, pp. 43-51.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 3, 1975. Jurisdiction of this court is invoked under 28 U.S.C. sec. 1254(1). Jurisdiction of the court of first instance in the United States District Court for the Middle District of North Carolina was founded upon 49 U.S.C. sec. 322(b).

QUESTIONS PRESENTED

1. Does the system of entry controls in motor transportation currently enforced by the Interstate Commerce Commission violate the statutory criteria for regulation?

2. Does the system of entry controls in motor transportation currently enforced by the Interstate Commerce Commission violate substantive due process of law?

3. Were petitioners required to apply to the Interstate Commerce Commission for operating authority before being entitled to attack the Commissioner's regulations in defending

an injunction action brought by the Commission?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Amendment V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CODE

49 U.S.C. Preceding Section 1.

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject

to the provisions of this Act (chapters 1, 8, 12, 13, and 19 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;- all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act (chapters 1, 8, 12, 13, and 19 of this title) shall be administered and enforced with a view to carrying out the above declaration of policy.

49 U.S.C. sec. 307(a).

(a) Subject to section 310 of this

title, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: Provided, however, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

49 U.S.C. sec. 308(a)

(a) Any certificate issued under section 306 or 307 of this title shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route

points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 304(a) (1) and (6) of this title: Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

STATEMENT OF THE CASE

Petitioner George T. Appleyard, III, is the owner and operator of a tractor-trailer truck engaged in the transportation of exempt agricultural commodities. Petitioner James W. Cain is the former manager of Overdrive Magazine, a publication widely circulated among truckers. (A. 13, 14, 64, 80).[1]

In early September, 1969, Appleyard and Cain, with participation of the defendant Parkhurst (who is not a party to this appeal), arranged for Appleyard to transport on his truck a load of chipboard from Rural Hall, North Carolina, to the Interstate Commerce Commission building in Washington, D.C. (A. 21-27). Chipboard is a regulated commodity, and can be handled in interstate motor transport only by a regulated carrier with franchise rights granted by the Interstate Commerce Commission. Petitioner Appleyard did not hold franchise rights issued by the Interstate Commerce Commission to carry any type of commodity in interstate commerce. (A. 426-27).

After parking his rig in front of the Interstate Commerce Commission, Appleyard, in the company of Cain, entered the Interstate Commerce Commission building and advised em-

[1]References are to the Appendix filed in the court of appeals unless otherwise stated.

ployees of the Commission that transportation of the load of chipboard was for the purpose of demonstrating their opposition to the Commission's administration of Part II of the Interstate Commerce Act. They contended that truckers, under the law and the Constitution, have the right to provide transportation services in interstate commerce without regulation as to commodities carried, routes, and points of origin and destination. (A. 357-58).

The Interstate Commerce Commission filed this action on October 27, 1969, seeking to enjoin petitioners from violating the Interstate Commerce Act. (A. 2, 12-19). On January 10, 1974, the district court entered a final judgment perpetually enjoining petitioners Appleyard and Cain from violating the Interstate Commerce Act. (Appendix hereto, pp. 43-51). This judgment was affirmed by the court of appeals on April 3, 1975. (Appendix hereto, pp. 52-55).

REASONS FOR GRANTING THE WRIT

I. THE SYSTEM OF ENTRY CONTROLS IN MOTOR TRANSPORTATION CURRENTLY ENFORCED BY THE INTERSTATE COMMERCE COMMISSION VIOLATES THE STATUTORY CRITERIA FOR REGULATION.

Congress enacted the Motor Carrier Act of 1935, now Part II of the Interstate Commerce Act, 49 U.S.C. sec. 301,

et seq., during the Great Depression. The principal statutory history of this legislation is found in the report of Joseph B. Eastman, Coordinator of Transportation. House Document No. 89, 74th Cong. 1st Sess. (1934); Senate Document No. 152, 73rd Cong. 2d Sess. (1934). These documents disclose that the Motor Carrier Act was intended to provide for (1) stability of rates, (2) maintenance of adequate capacity, (3) elimination of excess capacity, (4) extending services to isolated areas, (5) extending services to shippers with small quanities to be carried, (6) stabilization of profits, (7) maintenance of adequate investments, (8) provisions for technological changes, (9) maintenance of adequate service, (10) protection of shippers against damages and loss of cargo, (11) enforcement of standards of safety, and (12) enforcement of carrier financial responsibility.

As a preamble to the Interstate Commerce Act, Congress in 1940 enacted the National Transportation Policy:

> It is hereby declared to be the national transporation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to

> promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; -- all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. Declaration of Policy, 49 U.S.C. preceding sec. 1.

This Court has stated that the National Transportation Policy "is to govern the Commission in the administration and enforcement of all provisions of the Act,"

and the Court made it clear that "this policy is the yardstick by which the correctness of the Commission's actions will be measured." Schaffer Transportation Co. v. United States, 355 U.S. 83 (1957).

Petitioners established in the record of this case that each of the statutory purposes expressed in the Eastman Report and the National Transportation Policy, 49 U.S.C. preceding sec. 1, is disserved by the administration and application of Part II of the Interstate Commerce Act.

All of the evidence as to the validity of the Commission's regulatory system was offered by petitioners. The Interstate Commerce Commission did not present any evidence to rebut or contradict that offered by petitioners. What's more, the Commission in its answers to interrogatories and responses to requests for admissions, conceded that its officers and employees had no knowledge about critical factors in the operation of the statutes, such as the extent of unused capacity in the industry, the effect that elimination of route and commodity restrictions would have on this unused capacity, and the effect of elimination of these restrictions on rates. (A. 97, 99, 106, 115).

Petitioners offered the expert evidence of two eminently qualified transportation economists, George W. Hilton

and Walter Miklius. Both of the experts are intimately familiar with current transportation economic conditions and the effects that the Commission's administration of Part II of the Interstate Commerce Act has had upon the trucking industry. The testimony of these witnesses overwhelmingly demonstrates that the Commission is violating the laws it is charged with administering.

The district court made no findings of fact bearing on the legality or constitutionality of the Commission's system of regulation. The only findings and conclusions that legitimately can be made on this record require a judgment in petitioners' favor. Summarized according to the principles expressed in the National Transportation Policy, these are:

1. "fair and impartial regulation of all modes of transportation;" "without ... unjust discriminations, undue preferences or advantages, or unfair ... ... competitive practices;"

Petitioner Appleyard holds no certificate of convenience and necessity from the Interstate Commerce Commission. He is authorized to carry only commodities exempt from regulation, "ordinary livestock, fish (including shellfish), or agricultural commodities (not including manufactured products thereof)..."

49 U.S.C. sec. 303(b) (6). Exempt commodities, principally fresh fruits and vegetables, are transported generally from the produce growing regions of Florida, California, and Texas, to the cities of the Northeast and Midwest. (A. 274, 375-76).

The options available to the trucker, who does not have a franchise that would allow him to carry a load on the return trip are (1) to trip-lease his vehicle, (2) to "deadhead" or return empty, or (3) to carry a "hot load" or illegal cargo. (A. 399-400). Trip leasing is not an attractive proposition. The lessor provides his equipment, labor, fuel, and all other operating costs, but must pay the franchised carrier-lessee 25 - 40% of the freight revenue just for the privilege of trading on the lessee's franchise. (A. 380-81, 400).

There is not much point in the exempt commodity carrier, or any other person, making application to the Interstate Commerce Commission for a franchise that would provide reasonable backhaul authority. The Commission now makes very few grants of authority to haul general commodities. When new rights are granted, the Commission favors the application of the large established carriers. The Commission tends to ignore shipper needs and to favor truckers already possessing operating authority, even though the appli-

cant may demonstrate that he can provide cheaper, more efficient, and more effective service to the shipping public. The applicant has the burden of showing that carriers with franchises authorized to handle the traffic involved have been given the opportunity to do so and have been found wanting in some respect. (A. 143, 270). See Volotta, The Impact of Federal Entry Controls on Motor Carrier Operation 86 (1967); Chandler, Convenience and Necessity; Motor Carrier Licensing by the Interstate Commerce Commission, 28 Ohio St. L.J. 379, 390 (1967).

Instead of adhering to the provisions of the National Transportation Policy calling for "fair and impartial regulation" and for transportation "without unjust discriminations, undue preferences or advantages, or unfair . . . competitive practices," the Commission, in administering the law has been unfair to and has unjustly discriminated against small truckers and new carriers, has been partial toward and has granted undue preferences and advantages to large, existing carriers, and has created unfair competitive practices by making it impossible for smaller and newer organizations to compete with the great established common carriers.

2. "to promote . . . economical . . .

service . . . in transportation and among the several carriers; . . ." and "to encourage the establishment and maintenance of reasonable charges for transportation services,"

The exempt commodity carriers are not subject to entry controls and compete freely with one another, with regulated carriers, and with private carriers for the transportation of exempt commodities. Much can be learned about what the motor transportation industry in general would be like without restrictions as to commodities, routes of travel, and points of origin and destination, by examining the conditions in the exempt carrier segment of the industry. With regard to the Congressional purpose of reasonable charges, it is very instructive to compare the tendencies of rates for the commodities fresh and frozen poultry and fresh and frozen fruits and vegetables, before, during and after brief periods in which these commodities were free of regulation.

As a result of court decisions, fresh dressed poultry came under the agricultural exemption in 1955, and frozen poultry in 1956. Frozen fruit and vegetables were declared to be exempt commodities by a court decision in 1956. The Interstate Commerce Act was amended in 1958 removing frozen fruit and vege-

tables from the exemption. Department of Agriculture studies, participated in by petitioners' expert witness Miklı s, established that motor transportation rates on fresh and frozen poultry decreased by 33% following the exemption, and rates on frozen fruit and vegetables decreased by approximately 19% following the exemption. During the same period, regulated truck rates and rail rates were rising. After frozen fruit and vegetables were taken off the exempt list in 1958, many of the rates on these commodities increased. (A. 151, 267).

The history of these commodities, which were alternately regulated and free of regulation, provides important evidence of how America's motor transportation system would work, if free entry by carriers was permitted by the Interstate Commerce Commission. Both of petitioners' experts were of the opinion that motor carrier rates would decrease, if commodities, routes, and points of origin and destination were freed of regulation. (A. 177, 278-81).

The charges of regulated carriers are higher than would prevail in a system of free competition, because the cartelization of the industry has resulted in inadequate cost control and excess profits. Again, looking at the

non-regulated sector of the industry, we see that there is a tendency toward equality between marginal costs and price, which is the model of any competitive system. On the other hand, with the regulated carriers rates exceed marginal costs by approximately 20% (A. 163-65). In its answers to interrogatories, the Commission said that it had no reason to disagree with the results of the study by Walter Miklius showing that rates of exempt carriers are generally lower than those of regulated carriers, and that rates of exempt carriers are patterned more closely on the cost of providing services than are the rates of regulated carriers. (A. 104, 114).

Not only are the profits of the regulated carriers excessive, but their costs are also not controlled. Lack of control over costs is another characteristic of a cartelized industry. In spite of the existence of more excess capacity in the exempt sector (resulting from lack of return loads for exempt carriers), the exempt carriers have achieved lower costs per ton mile than the regulated carriers. (A. 153-156, 264-66).

Among the unnecessary costs of regulation of motor carriers, there are the costs of obtaining and maintaining franchise rights, the costs resulting from maintaining a great excess capacity, and

the excess profits earned by a cartelized industry. Conservatively, the total cost to the American public annually as a result the Interstate Commerce Commission's control over entry in the motor transport industry, is $2 billion a year. (A. 177-78). In other words, instead of the economical service and reasonable charges mandated by the National Transportation Policy, the service is uneconomical and the charges are unreasonable to the tune of $2 billion annually.

3. "to promote . . ., adequate, . . . and efficient service . . ."

The experience gained in connection with the transportation of frozen fruits and vegetables, and fresh and frozen poultry during the alternating periods of regulation and non-regulation of these commodities, provides important evidence as to the efficiency of the motor transportation industry with entry controls as administered by the Interstate Commerce Commission, and an industry free of such restrictions.

According to studies involving shippers of these commodities in which petitioners' expert witness Miklius participated, the services of exempt carriers were generally preferred by the shippers over the services of the regulated carriers. The shippers said that,

"The [exempt motor carriers] are . . . small businessmen who are willing to adapt their time schedules to those of the shippers and, in general, give more personalized service than larger firms. For example, produce shippers maintain that small, exempt truckers exercise more care in handling cargo and checking temperature and humidity in transit than drivers of regulated carriers." (A. 266, 336).

Important in the concept of service is to insure that shippers with small shipments, less than truckload lots, and remote shippers have reasonable access to the motor transport system. Unlike many regulated utilities, motor carriers are not required by law to accept specific unprofitable consignments. Again, it is the exempt carriers, and not regulated carriers, which have demonstrated the ability to provide adequate service for small and remote consignments (A. 151-52). The Interstate Commerce Commission did not contest this evidence. In answer to petitioners' interrogatories, the Commission said it had no reason to believe that Miklius' findings were invalid that exempt carriers are more willing than non-exempt carriers to load and unload at multiple points; that exempt carriers provide better, more personalized service than regulated carriers; and that exempt truckers exercise more

care in handling cargo and checking temperature and humidity, than regulated carriers (A. 104, 114).

Objective proof that more adequate and efficient service is provided by a motor transportation industry freed of entry controls, is the evidence that both the market area and the sales of a commodity expand when it is transported by a non-regulated, rather than a regulated, motor carrier. (A. 171-72, 272-73). Another consistent objective piece of evidence is that when regulated and non-regulated carriers compete for the same commodity (as is the case with any exempt commodity), the market share of the unregulated carrier increases at the expense of the market share of the regulated carrier. (A. 162-63). For example, following the exemption of fresh and frozen poultry, the share carried by regulated motor carriers decreased from 100% to 19% for fresh poultry, and from 100% to 30% for frozen poultry. (A. 267).

Other indices of adequacy of service, include condition of the carrier's equipment as it relates to the condition of the cargo, ability of the carrier to keep up with technological changes, and provision of adequate insurance. The non-regulated carriers have been proven satisfactory in all these respects. Exempt and regulated carriers operate equivalent

equipment. (A. 273). The exempt sector of the industry has kept up with technological changes in equipment, fully to the extent that the regulated part of the industry has. (A. 167-68, 269-70).

Cargo insurance is made available by exempt carriers to those shippers who want it. In some instances, on the other hand, regulated carriers require shippers to pay for cargo insurance they don't want. (A. 156-57).

For the reason discussed above, and for other reasons that will be discussed below, a motor transportation system without entry control, unquestionably would provide more adequate and more efficient service, than is provided by the industry as regulated by the Interstate Commerce Commission. Elimination of restrictions on commodities, routes, and points of origin and destination, would fulfill the goals of adequate service and efficient service stated in the National Transportation Policy.

4. "<u>to promote safe, . . . service</u>"

A comparison of safety practices between a regulated and a non-regulated motor transport industry, can be made by examining the experience of exempt and franchised carriers in recent years. The equipment of exempt carriers is as safe

as that of regulated carriers. (A. 273).

The Interstate Commerce Commission formerly imposed safety regulations (and related regulations on permissible hours of service and equipment specifications) equally to franchised carriers, carriers of exempt commodities, and private carriers. Enforcement of safety is an entirely different matter from economic regulation. Economic regulation is not an effective way of enforcing safety requirements. There are better and more direct ways to accomplish this goal. (A. 218).

In American Trucking Association v. United States, 344 U.S. 298, (1953), the Court said that the conclusion that highway safety might be impaired by permitting trucks exempt from regulation to travel on the highways rests on "informed speculation rather than statistical certainty. A road check examination conducted by the Bureau [of Motor Carriers] did not indicate any significant difference in the number of safety violations [between exempt and regulated vehicles] . . ."

The relationship between economic regulation and safety of operations has now been conclusively disestablished by act of Congress. All of the former authority of the Interstate Commerce Commission has been transferred to the Department of

Transportation under 49 U.S.C. sec. 304(a) (1), (2), (3), (3a) and (5) dealing with safety, hours of service, standards of equipment, maximum hours of service of employees, and other related matters. P.L. 89-670, October 15, 1966, 80 Stat. 931.

5. "to . . . foster sound economic conditions . . . among the several carriers;"

The pattern of economic regulation imposed by the decisions of the Commission has tended to produce unsound, not sound, economic conditions among the carriers.

The Commission has often restricted carriers to the grant of authority to transport a single commodity. One survey disclosed that 62% of regulated truckers had been limited to specific commodities; that 40% of these had been limited to one commodity or type of commodity; and that 88% of these had been limited to six commodities or less. Board of Investigation and Research, Federal Regulatory Restrictions Upon Motor and Water Carriers, S.Doc. 78, 79 Cong. 1st Sess. 304-319 (1945).

The Commission also habitually imposes circuitous and indirect routes on carriers, so that they are not permitted to haul commodities for which they have authority on the most direct

route. One example is a carrier operating between New York and Montreal via Reading, Pennsylvania, a detour of some 200 miles. Walter A. Adams, "The Role of Competition in the Regulated Industries," Papers and Proceedings of the Seventieth Annual Meeting, 1957, American Economic Review 529 (1958). Many carriers have been limited to such indirect routes. (A. 258-59).

The most serious impediment to sound economic conditions in the industry, is the tremendous excess backhaul capacity that has been generated by the regulated system. Trucks drive millions of miles each year unloaded, while other trucks make unnecessary loaded trips in the same direction. The excess backhaul capacity has several causes, all of them attributable to the Commission's administration of Part II of the Interstate Commerce Act. First, regulated carriers frequently are authorized to carry commodities only in one direction, so that the return trip must remain empty. One survey indicated that about one-third of regular route inter-city carriers had some return restrictions, and about one-tenth of them had no backhaul privileges whatever. Board of Investigation and Research, supra. (A. 261-62). Second, the one-way movement of exempt agricultural products to market, with the exempt carrier having no backhaul authority, provides another important source of excess capacity. (A. 376-79).

A third source of empty backhaul capacity is the private carrier, which has no cargo for the return trip after making its deliveries. (A. 145-46).

Efforts by carriers to acquire backhaul authority, and to reduce the number of empty trips on highways, in the words of the expert witness Hilton, have been "very rigorously put down by the Commission . . . . It is going so far as to endeavor to prevent permanently the use of such vehicles for regulated commodities." (A. 145-47).

The extent of excess capacity in the trucking industry is shocking. According to a study conducted by the witness Miklius, regulated motor carriers operate 45.8% of all trips with empty backhauls, and exempt motor carriers operate 62.9% of all trips with empty backhauls. (A. 257). Even when the empty backhauls are disregarded, the level of capacity utilization in the motor transport industry remains below 50% (A. 136-37, 257).

One of the Congressional purposes in enacting Part II of the Interstate Commerce Act, of course, was to eliminate the excess capacity in the industry that was found to exist during the Depression. The Commission's administration of the Act has had precisely the contrary result. Conceivably, entry controls could reduce excess capacity, if the numbers of ve-

hicles were limited. However, the Commission places no limit on the number of vehicles each regulated franchisee may own and operate, as well as lease and operate. (A. 101-12).

Excess capacity, of course, is detrimental to the operations of the individual carrier because it increases operating costs unnecessarily, is injurious to the industry as a whole because it results in a massive inefficiency, and is harmful to the public because it ties up and expends resources needlessly as well as causing rates to be artificially high.

Among the many direct and indirect harmful effects of excess motor transport capacity, are congestion on the highways, physical depreciation of the highways, air pollution, consumption of fuel unnecessarily, and unnecessary use of other resources in limited supply, such as steel. (A. 149, 152-53, 263).

6. "<u>to . . . foster sound economic conditions in transportation . . .</u>"

Many conditions, which result solely from the Commission's administration of Part II of the Interstate Commerce Act, that have contributed to the unsound economic condition of the motor transport industry, are discussed above. Among them

are chronic excess capacity, inefficient service, and overpriced service.

Another condition that has damaged the economy of the industry, which also can be attributed to the Commission's economic regulation, is that of increasing concentration among the carriers.

It is widely agreed that there are no important economies of scale in the motor transportation industry. A modestly capitalized carrier is able to compete effectively. There are no large fixed assets that a motor carrier must acquire, comparable to roadbeds and other facilities required by a railroad. (A. 128).

Despite the fact that economies of scale do not exist in the industry, the trend is toward increasing concentration of ownership among regulated carriers. (A. 157-58). According to the expert witness Miklius, it is the entry control exercised by the Interstate Commerce Commission that is the cause of increased concentration of ownership among motor carriers. (A. 274-75). Historic trends have shown a great reduction in the number of regulated motor carriers, a greater concentration of ownership among large firms, an increase in the size of the average firm, and corresponding declines in relative

importance of the smaller regulated firms. Byron Nupp, Control of Entry as an Economic and Regulatory Problem, I.C.C. Practitioners' Journal 591, 603 (1968).

It is important to note that among the exempt carriers, unlike the regulated carriers, there has been no development of concentration in the industry. (A. 158). The size of the carrier in the exempt sector is also on the average smaller and more evenly distributed than in the regulated sector; for example, the modal fleet size of exempt motor carriers was 2 to 3 truck tractors, compared with 20 to 49 truck tractors for regulated carriers. (A. 276-77).

The argument might be made that without economic protection provided by entry control, motor carriers would not be able to attract sufficient capital to operate in an efficient manner. This contention is disproved by experience with the non-regulated sector of the industry, where it has been shown that sufficient capital is attracted. (A. 165, 268).

Thus, it is readily perceived from all of this evidence that the Interstate Commerce Commission's exercise of entry control over the motor transport industry has led to prevailing unsound economic

conditions in the industry.

7. "without . . . destructive competitive practices;"

Destructive competition, instability, and wildly fluctuating rates were at one time thought to be inherent problems of the motor transportation industry that could be solved by entry control. This conception now has been proven to be false.

Again, it is necessary to look to carriers of exempt commodities, where the traditional competitive environment prevails, to determine whether these unwanted conditions are apt to occur. Excessive competition is not found in the exempt sector. On the contrary, it has been determined that profits in the exempt sector are high enough to attract new resources so that modern equipment is procured, that there has even been ample investment in the exempt sector to provide for both growing capacity and larger and more efficient equipment as a means of offsetting rising labor and other costs, that there are no significant changes in the distribution of truck-tractor fleets in the exempt sector which indicates that very few firms have left the industry during the recent years. (A. 276, 342-44). Alfred E. Kahn, The Economics of Regulation 184-185 (1971).

According to the evidence, there is no indication of instability among non-regulated carriers. The exempt sector is in fact remarkably stable. There is not an abnormally high number of business failures or short-lived forms. (A. 166-67, 269).

There is no evidence of wildly fluctuating rates among exempt carriers. If there were, shippers could contract with one or more carriers to provide services at agreed rates for a certain period of time. The infrequent use of such agreements in the exempt sector suggests that rate fluctuations are not significant. (A. 335.).

8. Healthy Competition. (Read into Part II of the Interstate Commerce Act by the Supreme Court in McLean Trucking Co. v. United States, 321 U.S. 67 (1944).

Although the encouragement of healthy competition is not separately stated as a goal in the National Transportation Policy, the Supreme Court in McLean Trucking Co. v. United States, supra, determined that this was one of the Congressional purposes of Part II of the Interstate Commerce Act.

There is a concensus among transportation economists that the motor transport industry is naturally appropriate for the free enterprise system. It is not a natural monopoly, and the carte-

lization of the industry by entry controls imposed by the Interstate Commerce Commission has had the effect of suppressing healthy competition. (A. 277). Transportation by motor trucks is the antithesis of a natural monopoly; it is in no way comparable to the rail transportation industry, with its commitments to massive investments in rights-of-way, tracks, and stations serving fixed routes. (A. 175-76).

There are three conditions of the trucking industry that are particularly susceptible to healthy, not destructive, competition. (1) The principal capital expenditures for trucking, payment for highway use and payment for trucks, are variable costs and relate to the rate of use, so that highways are paid for only as they are used by way of excise taxes, license fees, and tolls, and trucks are depreciated over relatively short periods of time in accordance with their rate or use. (2) The investment involved in each unit of trucking equipment is decreased in small increments. (3) Trucks are mobile, so that the capacity without any difficulty can be transferred from one market to another. Alfred E. Kahn, The Economics of Regulation 179-180 (1971).

Practical experience with competition in the motor transport industry again is found in the history of regulation, deregulation, and re-regulation of fresh and

frozen poultry and frozen fruits and vegetables. When regulation was removed from poultry, the shipments carried by regulated motor carriers decreased from 100% to 19% for fresh poultry, and from 100% to 30% for frozen poultry. The share hauled by regulated carriers following the exemption of frozen fruit and vegetables dropped from 100% to 71%. (A. 267). Thus, non-regulated carriers competed more successfully than regulated carriers for the exempt commodities.

In a similar context, it has been demonstrated that exempt carriers compete more effectively than regulated carriers, for the traffic carried by private carriers. (A. 172-73, 273-74).

9. "to recognize and preserve the inherent advantages of [each mode of transportation];"

It may be suggested that freeing the motor transport industry from entry control will tend to destroy the railroads. The experience is to the contrary.

It was observed in Australia, following de-regulation of motor carriers, that dynamic competition from motor carriers in fact had the effect of improving conditions of the rail carriers. Stewart Joy, Unregulated Road Haulage: The Australian Experience, XVI Oxford Economic Papers 284-285 (1964).

10. Overall Detrimental Effects of Commission's System Of Entry Control.

In addition to the evidence discussed above, there are many other indications that the Commission's system of control over commodities carried, routes, and points of origin and destination, has been a failure. There has been a general decrease in the percentage of all motor transportation performed by regulated carriers. (A. 263-64). When Federal Coordinator of Transportation Eastman designed economic regulations for the motor transport industry in 1935, he predicted that the regulation of motor carriage would not result in extensive private carriers, because private carriers would be burdened with empty backhauls and unable to compete with common carriers. (A. 173). This prediction proved to be incorrect. The inefficiency of a highway transportation system burdened by entry controls is clearly demonstrated by the great rise of private carriage in recent years. Private carriers, with no backhaul authority whatever, are able to transport commodities more economically than regulated carriers. Ann F. Friedlaender, The Dilemma of Freight Transport Regulations 117-118 (1970).

The prevalence of illegal carriage, dramatically illustrated by petitioner Appleyard's trip to the Interstate Commerce building in Washington, is another indicator of the failure of entry

controls in the industry. It is estimated that 98% of all exempt carriers haul "hot loads" from time to time, and it is thought that if these illegal loads were not carried, the exempt carriers would go broke (A. 67-69). Even among regulated carriers there is a high volume of franchise violation. (A. 53). The motor transportation of illegal loads is thought to be the most common crime in the United States (A. 148-49).

Other attempted circumventions of regulation have included the efforts to broaden non-regulated carriage by agricultural cooperatives, and to broaden contract carriage. See generally, George W. Hilton, Transportation Act of 1958 (1969).

These massive efforts by shippers, carriers, and consignees, to free themselves of entry controls in the motor transportation industry by various circumventions and outright illegality, convincingly demonstrates the uselessness of these restraints on a natural free enterprise industry.

Evidence that the termination of entry controls in motor transportation will be universally beneficial is obtained from the experiences of Australia, Great Britain, Sweden, and some Canadian provinces, where such regulation has been abandoned in recent

years. For instance, following de-regulation by judicial decree in Australia, the industry rapidly became sufficiently mature, to develop into a stable and efficient industry, providing regular service at lower cost. The forecasted instability and destructiveness of competition were not experienced. Stewart Joy, Unregulated Road Haulage: The Australian Experience, XVI Oxford Economic Papers 275-285 (1964).

Generally following de-regulation in Great Britain, Australia, Sweden and certain Canadian provinces, rate stability prevailed, producing motor carrier industries that are both stable and efficient. (A. 270-72).

The expert witnesses, Miklius and Hilton, agreed that if controls over comodities, routes, and points of origin and destination were removed in the motor transportation industry, safety would not be adversely affected, costs would be reduced, transportation would become more economical, excess capacity would be more efficient, unfair or destrictive competion is not likely to occur, available capacity would be better used, rates would not fluctuate wildly and instead would only adjust in response to demand and supply conditions, isolated points and shippers with small quantities would not be less adequately served, profits of carriers would not become unstable, the carriers' ability to invest would be increased, the carriers would be able to adopt the latest technological advances, there would be no result of inadequate protection of shippers against damage and loss of cargoes, and financial

responsibility of the carriers would be improved. (A. 177, 180-85, 277-85). The Commission did not offer one shred of evidence to contradict these conclusions!

On cross examination petitioners' expert testified that he is aware of no economist who do not favor de-regulation of commodities, routes of travel, and points of origin and destination. (A. 301-04).

* * * * * * * * * * *

Apart from the overall Congressional purposes expressed in the National Transportation Policy, the Commission is given no guidance by Part II of the Interstate Commerce Act for the grant or denial of authority to act as a common carrier. The statute says only that motor common carrier service shall be authorized to the extent that it "is or will be required by the present and future public convenience and necessity; . . ." 49 U.S.C. Sec. 307.

To be sure, the legislative history indicates that Congress anticipated control by the Commission of the motor transport industry with respect to commodities carried, routes of travel, and points of origin and destination.

Congress wisely drew up the Motor Carrier Act as a highly flexible instrument of regulation. As the economic consequences of various interpretations of "public convenience and necessity"

change, in the light of new knowledge in the field of economics, and with changing conditions of the economy, the Commission has the statutory authority and duty to alter its system of regulation. This authority and duty extend to de-regulation of certain aspects of motor transportation. See George M. Chandler, Convenience and Necessity: Motor Carrier Licensing By the Interstate Commerce Commission, 28 Ohio St. L. J. 379, 389-90 (1967); Alexander Volotta, The Impact of Federal Entry Controls on Motor Carrier Operations, 40-44 (1967). In its decision to exempt all motor carrier operations in the State of Hawaii from economic regulation, the Commission accepted the principle that it has the authority to de-regulate as well as to regulate. Motor Carrier Operation in the State of Hawaii, Ex Parte No. MC-59 (1960). For the record in this case, the Commission admitted it has this authority. (A. 109, 117).

Instead of exercising its descretion to de-regulate the industry, the Commission has adhered rigidly to its original conceptions of "public convenience and necessity," failing to cope with changes in the industry and economy, failing to grasp modern economic principles. The painful consequence to the transportation industry, the public and the national economy are detailed above.

The Commissions' present day system of entry controls by restricting comodities, routes of travel, and points of origin and destination is arbitrary and capricious, in violation of the National Transportation Policy, 49 U.S.C. preceding Sec. 1, and contrary to the intent of Congress in enacting the Motor Carrier Act. When the Commission exceeds its authority under the Motor Carrier Act, the Court is obligated to intervene. Schaffer Transportation Co. v. United States, 355 U.S. 83 (1957). Petitioners, therefore, cannot lawfully be compelled to hold a franchise granted by the Commission before trucking general commodities in interstate commerce.

II. THE SYSTEM OF ENTRY CONTROLS IN MOTOR TRANSPORTATION CURRENTLY ENFORCED BY THE INTERSTATE COMMERCE COMMISSION VIOLATES SUBSTANTIVE DUE PROCESS OF LAW.

In Part I of this Petition, it is shown how the Interstate Commerce Commission's regulation of commodities, routes, and points of origin and destination disserves every conceivable rational Congressional basis for control of motor transportation, and how this regulatory scheme is arbitrary and capricious. These same features of the system render it violative of petitioners' rights under the due process clause of the Fifth Amendment.

Petitioner Appleyard is the owner and operator of a tractor-trailer rig. He is an interstate trucker by trade. Petitioner Appleyard desires to offer transportation services to the public. He does not possess a certificate of convenience and necessity for carrying any type of non-exempt commodity anywhere

in the United States. He has been permanently enjoined by the courts below from pursuing this occupation.

The government violates the constitution when it unreasonably impairs the ability of a citizen to pursue his occupation. Willner v. Commission on Character, 373 U.S. 96 (1963); Greene v. McElroy, 360 U.S. 474 (1959). In the present case petitioner has been unreasonably curtailed from pursuing his rightful occupation.

While the federal courts cannot sit as "super legislatures" and strike down federal laws which they deem unwise, Ferguson v. Skrupa, 372 U.S. 726 (1963), they are bound by the Fifth Amendment to invalidate economic regulations which arbitrarily interfere with lawful occupations, or which are accomplished by means not reasonably necessary or unduly oppressive upon individuals. Lawton v. Steele, 152 U.S. 133 (1894). Recently this Court affirmed that economic regulations without rational bases are violative of the Fifth Amendment. U.S. Department of Agriculture v. Murry, 413 U.S. 508 (1973); U.S. Department of Agriculture v. Moreno, 413 U.S. 528 (1973). The court of appeals wrongfully viewed these cases as being consistent with a complete abdication by this Court of constitutional reviews of economic regulation, treating them as procedural due process cases dealing with statutory presumptions. (Appendix hereto, p.55). It is clear, however, that U.S.

Department of Agriculture v. Moreno is an exercise of substantive due process economic review in which the statutory provision in question was held deficient.

The same constitutional tests, when applied to the Interstate Commerce Commission's regulation of the motor transport industry, compel the conclusion that the administrative action complained of here violates the petitioners' Fifth Amendment rights. Although the Motor Carrier Act may be constitutional on its face, it is unconstitutionally enforced by the Commission. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

III. PETITIONERS WERE NOT REQUIRED TO APPLY TO THE INTERSTATE COMMERCE COMMISSION FOR OPERATING AUTHORITY BEFORE BEING ENTITLED TO ATTACK THE COMMISSIONS REGULATIONS IN DEFENDING AN INJUNCTION ACTION BROUGHT BY THE COMMISSION.

The court of appeals held that petitioners had no right to defend the Commission's injunction action because the record does not show that petitioner "Appleyard has ever been or would be refused an operating permit,". . . (Appendix hereto, p. 54).

The court below is in error because the record affirmatively shows that it would have been futile for Appleyard to apply for operating authority. The Commission's witness and employee Teeple admitted that

there would not be any point in a person like Appleyard making application to the Commission for a franchise that would provide reasonable backhaul authority. (A. 419).

The record shows that the Commission now makes very few grants of authority to haul general commodities; that the applications of large, established carriers are favored when new rights are granted; that where there would be competition with an existing carrier, an applicant will not prevail even by demonstrating that cheaper and more efficient service will be provided. (A. 143, 270).

Because petitioner Appleyard is an owner-operator of a single rig, and is engaged in carrying agricultural produce from farms to cities, the only rights that would be of benefit to him are general commodity backhaul authority over much of the United States. It is manifestly unreasonable for him to hope for the grant of such authority. A recent survey of exempt truckers throughout the United States failed to disclose a single one rig operator regularly carrying exempt commodities that had a certificate from the Commission. Kenneth L. Casavant, Washington State University, Unpublished Survey (1975).

Moreover, the expense and delay involved in seeking rights from the Commission would be ruinous for the independent trucker. Costs for obtaining authority range from $12,000.00 for smaller operations to $45,000.00 for larger

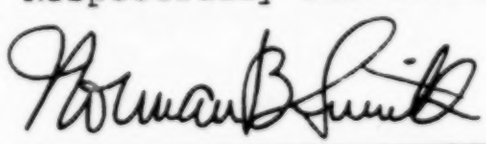
operations. It is not unusual for hearings on applications to be prolonged into years. James C. Nelson, "The Effects of Entry Control in Surface Transportation," Transportation Economics, 384 (1965); Competition, Regulation, and the Public Interest in the Motor Carrier Industry, 693, Report No. 1693, 84th Cong. 2d Sess. (1956).

There is no requirement of exhausting administrative remedies, when these remedies are ineffective, for example, because of delay, bias, or pre-determination, all of which factors are present in this case. Gibson v. Berryhill, 411 U.S. 564 (1973); Smith v. Illinois Bell Telephone Co., 270 U.S. 587 (1926); Kelly v. Board of Education, 159 F. Supp. 277 (M.D. Tenn. 1958).

CONCLUSION

For the reasons set forth above, petitioners pray that the Petition for Certiorari be granted.

Respectfully submitted,



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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

WINSTON-SALEM DIVISION

INTERSTATE COMMERCE COMMISSION, Plaintiff, v. GEORGE T. APPLEYARD, III, JAMES W. CAIN and MICHAEL PARKHURST, Defendants	F I L E D Greensboro, N. C. January 18, 1974 U. S. District Court Middle District of N.C.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION

GORDON, Chief Judge

This cause having come on for consideration by the Court upon the complaint of the plaintiff, the answers of the defendants, the pleadings, the evidence and exhibits presented at the trial on October 15, 1973, the briefs and representations of the parties, and the Court having considered each of the foregoing, now pursuant to Rule 52 of the Federal Rules of Civil Procedure,

makes its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This is a civil action brought by the Interstate Commerce Commission under the provisions of Part II of the Interstate Commerce Act (49 U.S.C. §301, et seq.), and particularly 49 U.S.C. §322(b) and under the general laws and rules relative to suits in equity arising under the Constitution and laws of the United States. By its complaint, the plaintiff seeks to perpetually and permanently enjoin the defendant George T. Appleyard, III, from transporting or holding out to transport property by motor vehicle in interstate commerce over public highways for compensation as a common or contract carrier until such time, if at all, as appropriate authority to engage in such transportation has been obtained, and that James W. Cain and Michael Parkhurst be perpetually enjoined and restrained from, in any manner, directly or indirectly, acting in concert or participating with said George T. Appleyard, III, or others, in the unlawful transportation of property in interstate commerce.

2. By order entered and filed on January 13, 1972, the defendant, Michael Parkhurst, was perpetually enjoined and restrained from, in any manner, directly or indirectly, knowingly acting in concert or participating with defendant George T. Appleyard, III, or others, in the unlawful transportation of property

in interstate commerce.

3. The defendant, George T. Appleyard, III, was and is a resident of the State of North Carolina, at Winston-Salem, which is in the Middle District of North Carolina; that he is and was engaged in the transportation of property in interstate commerce by motor vehicle, for compensation, on public highways, as a for-hire carrier within the Middle District of North Carolina; that he in fact did perform the transportation set out in Paragraph V of plaintiff's complaint, without having first obtained a certificate of public convenience and necessity, a permit, or other authority from the Interstate Commerce Commission. (Final Pre-Trial Order entered April 20, 1972.)

4. The defendant James W. Cain was a resident of the State of California when this suit was filed; that at that time he was the manager of Overdrive Magazine; that he did in fact deal with defendant George T. Appleyard, III, on behalf of said magazine in making arrangements with defendant Appleyard for the transportation of a shipment of chipboard in interstate commerce as detailed in Paragraph V of plaintiff's complaint. (Final Pre-Trial Order entered April 20, 1972)

5. The defendants George T. Appleyard, III, and James W. Cain, or either of them, have never been granted a certificate of public convenience and necessity or a permit or any other form of operating authority by the Interstate Commerce Commission. (Final

Pre-Trial Order entered April 20, 1972.)

6. The defendant George T. Appleyard, III, has acknowledged to representatives of the Interstate Commerce Commission that he has engaged in other acts of unauthorized transportation, that he plans to continue such operations and that both he and the defendant James W. Cain have and continue to claim a legal right to engage in the transportation of regulated commodities without first obtaining appropriate operating authority from the Interstate Commerce Commission. (Response to Requests for Admissions filed by defendant George T. Appleyard, III, on or about June 18, 1970, Response to Requests for Admissions filed by defendant James W. Cain on or about July 25, 1970, and Final Pre-Trial Order entered April 20, 1972.)

7. In view of the past and present conduct of the defendants, George T. Appleyard, III, and James W. Cain, and of their continued claims the operations and transportation hereinabove described was not and is not in violation of the law, it is apparent that there is a likelihood of a continuation of such conduct in the future.

DISCUSSION

Superficially, this case is as cut and dried as any which has come before the Court in some time. Yet, it should not be inferred that the action is viewed as frivolous, for, to the contrary, defendants'

position has much equitable appeal and engenders sympathy from fair minded men. Defendants have lucidly and comprehensively presented the plight of the truck-tractor owner-operator (the little man, if you will), caught up in the seemingly inscrutable web of Interstate Commerce Commission (I.C.C.) regulations. This is not meant to imply that plaintiff's position is unreasonable or shocking to the Court's conscience, for the Court should not and will not come to defendants' aid on the facts of this controversy.

In their brief, page 23, defendants state: "Very recently the [Supreme] Court has used substantive due process under the Fourteenth Amendment to strike down abortion laws in Texas and Georgia. Roe v. Wade, 41 Law Week 4213 (1973); Doe v. Bolton, 41 Law Week 4233 (1973)." Upon this and other older authority, defendants contend that the Court should invoke substantive due process and refuse to enforce certain I.C.C. regulations which they deem to be unfair. To do so, defendants argue, would not place the Court in the position of sitting as a "superlegislature", because the Court is asked only to disapprove of I.C.C. regulations and policy, and not legislation.

With these premises the Court cannot agree. As recently as December 5, 1973, in North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 42 Law Week 4035, The Supreme Court in no uncertain terms emphasized that substantive due process has been permanently consigned to the trash bin

of legal history.

> "Liggett, decided in 1928, belongs in that vintage of decisions which exalted substantive due process by striking down state legislation which a majority of the Court deemed unwise." Snyder's Drug Stores, Inc., supra, at 4038.

That the Court is asked here to review federal agency regulations rather than a state or federal statute is immaterial. By virtue of 49 U.S.C. §322(b), the regulations of the I.C.C. have the force and effect of statutory law and must be so treated by the Court.

In Ferguson v. Scrupa, 372 U.S. 726 (1963), relied upon in Snyder's Drug Stores, Inc., supra, the Court said:

> "We refuse to sit as a 'super-legislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts read the Due Process Clause ' to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor are we willing to draw lines by calling a law 'prohibitory' or 'regulatory.' Whether the

> legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas." Ferguson v. Scrupa, 372 U.S. 726, 731-732 (1963).

In the final analysis, it is felt that defendants' contentions are essentially economic policy disagreements with the I.C.C., and are, therefore, not properly the subject of review or revision by the Court. Defendants' remedy, if any be needed, lies with the I.C.C. and untimately Congress.

CONCLUSIONS OF LAW

1. From a review of the pleadings, oral testimony, and briefs and presentations of the parties, it is concluded that the complaint states a cause of action against said defendants under Part II of the Interstate Commerce Act (Title 49, U.S. Code, Section 301, et seq.), and Section 2 of the Elkins Act (Title 49, U.S. Code, Section 42), and that this Court has jurisdiction of the cause by reason of the provisions of 49 U.S. Code 322(b).

2. The Court further concludes that the defendant George T. Appleyard, III, has, on certain occasions, operated as a for-hire common or contract carrier by motor vehicle, for compensation, in interstate commerce over public highways and that such operations were performed in violation of 49 U.S.C. 303(c), 306(a) and 309(a), and that the defendant James W. Cain has acted in concert and participated with the defendant George T. Appleyard, III, in the commission of certain of such violations of the Interstate Commerce Act.

3. The Court further concludes that because of defendant Appleyard's prior violations of the Act, and the participation therein of the defendant Cain, and the continued insistence by both said defendants that such conduct is not unlawful, a reasonable likelihood exists that violations of Title 49 U.S.C. 303(c), 306(a) and 309(a) might occur in the future unless a permanent injunction is issued.

4. That the acts and operations of said defendants George T. Appleyard, III, and James W. Cain, and each of them, constitute violations of Sections 203(c), 206(a) and 209(a) of Part II of the Interstate Commerce Act (49 U.S.C. 303(c), 306(a) and 309(a), and, as such, are subject to be enjoined by this Court upon application of the Interstate Commerce Commission under the express provisions of Section 222(b) of the Interstate Commerce Act [49 U.S.C. 322(b)].

That a judgment allowing the injunction prayed for in the plaintiff's complaint will be entered.

/s/ Eugene A. Gordon
United States District
Judge

January 18, 1974

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 74-1342

INTERSTATE COMMERCE COMMISSION, Appellee,	)	
v.	)	DECISION
GOERGE T. APPLEYARD, III, JAMES W. CAIN, Appellants.	)	

Appealed from the Middle District of North Carolina at Winston-Salem. Eugene A. Gordon, Chief Judge.

(Argued December 4, 1974.)
(Decided April 3, 1975)

Before Boreman, Senior Circuit Judge, and Butzner and Field, Circuit Judges.

Norman B. Smith (Smith, Carrington, Patterson, Follin & Curtis, on brief) for appellants; J. Preston Proffitt, Jr., Regional Counsel, Interstate Commerce Commission, (Bernard A. Gould and Robert S. Turkington, Attorneys, Interstate Commerce Commission, on brief) for appellee.

BUTZNER, Circuit Judge:

In order to test the constitutionality of the Interstate Commerce Commission's policies regulating interstate truck transportation, George T. Appleyard and James W. Cain deliberately violated Part II of the Interstate Commerce Act, 49 U.S.C. §301, et seq. The district court enjoined them from further violations, as provided in 49 U.S.C. §322. Appleyard and Cain appeal the injunction on the ground that the I.C.C.'s application of the Act deprives them of liberty without due process of law. We affirm the district court and deny them relief because they have not shown that Appleyard would be unlawfully refused an operating permit were he to seek one.

The facts are simple. Except for businesses hauling their own goods and carriers of unprocessed farm products, every carrier of goods by truck in interstate commerce must have either a permit or a certificate of convenience and necessity issued by the I.C.C. 49 U.S.C. §§303(b)(7) and (c), 306(a), 309. Appleyard, an independent truck owner who hauls farm products, and Cain, the editor of a magazine for truckers, contracted for Appleyard to carry a load of chipboard from North Carolina to Washington, D. C. Appleyard, who has neither a certificate nor a permit, carried the load and then reported the trip to the I.C.C., which subsequently obtained the injunction.

Appleyard and Cain do not claim that the permit requirements of Part II of the

Interstate Commerce Act are facially unconstitutional. Instead, they argue that the present criteria for permits irrationally restrict Appleyard's liberty to engage in interstate trucking. In support of this contention, they presented expert testimony, mostly uncontradicted, to the effect that the present policy of restricted entry and limited competition favors established carriers over newcomers, leads to extravagant overcapacity, requires empty backhauls, increases operating costs, wastes fuel, and causes excessive freight rates.

Appleyard and Cain urge that by not instituting a policy of free entry and price competition, the I.C.C. has injured both the public and small truckers without corresponding public benefits and that it has failed to follow the statutory National Transportation Policy, which controls its discretion. Since, in their view, the present operating permit system is of no public benefit and is beyond the I.C.C.'s authority, they assert that Appleyard cannot be enjoined to comply with it. Despite the appellants' economic arguments, we affirm the district court for two reasons.

In the first place, the record does not show that Appleyard has ever been or would be refused an operating permit, or indeed that he has ever applied for one. Appleyard concedes that Congress may require permits for interstate motor carriers. Since he does not attack the statute as unconstitutional on its face, we cannot presume that a request for a permit would be futile. Until he has shown

that he cannot obtain a permit under the existing regulations, he has suffered no legally cognizable injury from this injunction. Lehon v. Atlanta, 242 U.S. 53 (1916); see Smith v. Cahoon, 283 U.S. 553, 562 (1931) (Dictum).

Secondly, the federal courts will not review legislation or administrative action on the basis of their views of reasonable economic policy. North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973); Ferguson v. Skrupa, 372 U.S. 726 (1963). The appellants' reliance on U.S. Dept. of Argiculture v. Murry, 413 U.S. 508 (1973), and U. S. Dept. of Argiculature v. Moreno, 413 U.S. 528 (1973), is misplaced. These cases do not review legislative policy objectives. Instead, they test the procedural due process of implementing policy by utilizing certain statutory presumptions. Appleyard's claim is no more than a contention that the public would be better off if the I.C.C. modified its control of interstate motor transportation. This may well be true. Congress, however, has given the Commission the authority to reconcile the overlapping and conflicting goals of the National Transportation Policy. See Schaffer Transportation Co. v. United States, 355 U. S. 83, 92 (1957).

AFFIRMED.

No. 74-1643

AUG 20 1975

In the Supreme Court of the United States

OCTOBER TERM, 1975

GEORGE T. APPLEYARD, III
AND JAMES W. CAIN, PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1643

GEORGE T. APPLEYARD, III
AND JAMES W. CAIN, PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

In September 1969, petitioner Cain, in concert with one Michael Parkhurst, arranged for petitioner Appleyard, an independent truck owner-operator, to transport a shipment of chipboard from North Carolina to the Interstate Commerce Commission building in Washington, D.C. Petitioners concede (Pet. 7) that chipboard is a regulated commodity that can be transported by motor carrier in interstate commerce only by a carrier possessing a certificate of public convenience and necessity issued by the Commission, and that petitioner Appleyard does not possess such a certificate. Petitioners further state (Pet. 8) that the purpose of their September 1969 actions was to demonstrate their opposition to the Commission's administration of Part II (the provisions regarding motor transport) of the Interstate Commerce Act.

The Commission brought suit in the district court seeking to enjoin petitioners from further violations of the Act, and the district court entered a permanent injunction on January 18, 1974 (Pet. App. 43-51). The court of appeals affirmed (Pet. App. 52-55).

The court of appeals correctly characterized (Pet. App. 55) petitioners' claim as "no more than a contention that the public would be better off if the I.C.C. modified its control of interstate motor transportation." Petitioners' contention that the Commission's administration of the Act constitutes unwise economic policy is not of constitutional dimensions; it rests, as petitioners admit, on notions of "substantive due process" (Pet. 38) and this Court has repeatedly held it inappropriate for judicial review of legislative or administrative action to proceed on such a basis. *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156; *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 489. In any event, as the court of appeals also properly held (Pet. App. 54-55), since petitioner Appleyard has never been refused an operating permit, it could not be presumed that a request would be futile, and thus, Appleyard has shown no legally cognizable injury from the injunction. *Lehon* v. *Atlanta*, 242 U. S. 53, 56.[1]

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[1]Petitioner Appleyard's assertion (Pet. 41) that it is unreasonable for him to hope for a grant of authority from the Commission is at best an allegation of anticipated improper administration that is not ripe for review.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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